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CASES AND MATERIALS ADVANCED CONSTITUTIONAL LAW

THE STRUCTURE OF CHARTER RIGHTS

VOLUME II

Professor Lorraine E. Weinrib

January, 1989

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T. Meron (ed.) Human Rights In International Law (1985) pp 69-105 only.

Chapter 3 The Jurisprudence of Human Rights*

Jerome J. Shestack

I. Legal and Philosophical Considerations

A. INTRODUCTION

This book surveys the world of human rights and quickly immerses the reader into the sea of covenants, declarations, and documents that record the small victories and large frustrations in this area.

Yet, at the outset it may be prudent to confess a deficiency in the process, one which offers a challenge to serious students. Moses Moskowitz has put it in these words:

International human rights is still waiting for its theoretician to systemize the thoughts and speculations on the subject and to define desirable goals. Intelligent truisms do not necessarily add up to a theory. No one has yet arisen to draw together into a positive synthesis the facts and fancies which emerge daily from events of bewildering complexity and to carry on an authentic debate. . . . In the absence of a definite body of doctrine, as well as of deeply rooted convictions, international human rights have been dealt with on the basis of the shifts and vagaries of daily affairs and of evocations of daily events. . . .¹

Despite the force of this observation on the tattered condition of contemporary philosophy, there are benefits from discussing the jurisprudential theories of human rights. Indeed, our own attitudes toward the subject are likely to remain obscure unless we try to understand the philosophies that shape them. The essential task of philosophic inquiry is to deepen our understanding of the issues, not necessarily by providing answers, but by illuminating the concepts and logic with which we address the issues. Perhaps our goal should be no more than to identify the relevant questions. A pertinent anecdote is that of Gertrude Stein, who, on her deathbed, asked of her friends:

‘What is the answer? What is the answer?’ A philosopher friend leaned over and spoke gently in her ear. Gertrude Stein closed her eyes and whispered: ‘Then, what is the question? What is the question?’ In this chapter we shall concentrate on the questions.

B. THE NATURE OF RIGHTS

One of the initial questions is what is meant by human rights. The question is not trivial. Particularly in the international sphere, where diverse cultures are involved, where positivist underpinnings are shaky, and where implementation mechanisms are nonexistent or fragile, the issue of definition can be crucial. Human beings, as Sartre said, are ‘stalkers of meaning’. Meaning tells us ‘why’. How we understand the meaning of human rights will influence our judgments on such issues as which rights are regarded as absolute, which are universal, which should be given priority, which can be overruled by other interests, which call for international pressures, which can demand programs for implementation, and which will be fought for.²

